U.S. Department of Labor

Office of Administrative Law Judges
Heritage Plaza Bldg. - Suite 530
111 Veterans Memorial Blvd
Metairie, LA 70005

(504) 589-6201
(504) 589-6268 (FAX)

Issue Date: 07 January 2004

CASE NO.: 2003-LHC-712

OWCP NO.: 07-113700

IN THE MATTER OF:

MIGUEL A. NEVAREZ

Claimant

v.

MCDERMOTT, INC.

Employer/ Carrier

APPEARANCES:

DAVID A. HILLEREN, ESQ.

For The Claimant

J. LOUIS GIBBENS, ESQ.

For The Employer/Carrier

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (herein the Act), brought by Miguel A. Nevarez (Claimant) against McDermott, Inc. (Employer/Carrier).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for a formal hearing. Pursuant thereto, a Notice of Hearing was issued scheduling a formal hearing on July 16, 2003, in Metairie, Louisiana. All parties

were afforded a full opportunity to adduce testimony and offer documentary evidence. The parties argued the matter on the record and filed no post-hearing briefs. Claimant offered 24 exhibits, including exhibit 21(a), an updated list of pharmacy records through July 14, 2003, which were received. Employer/Carrier proffered 23 exhibits, including 15(a), an updated Section 8(f) application, which were admitted into evidence along with one Joint Exhibit. This decision is based upon a full consideration of the entire record. [1]

Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1), and I find:

1. That the Claimant was injured on February 9, 1989.

2. That Claimant's injury occurred during the course and scope of his employment with Employer.

3. That there existed an employee-employer relationship at the time of the accident/injury.

4. That the Employer was notified of the accident/injury on February 9, 1989. (CX-2).

5. That Employer/Carrier filed a Notice of Controversion on February 23, 1994.

6. That informal conferences before the District Director were held on December 2, 1994 and March 12, 2002.

7. That Claimant received temporary total disability benefits from February 21, 1989, through June 6, 1993, and from October 30, 1995, through June 21, 2003, at a compensation rate of $321.09 for a total of 622.43 weeks, or $200,266.14. Claimant received temporary partial disability benefits from June 7, 1993 through February 19,

[1] References to the transcript and exhibits are as follows: Transcript: Tr.___; Claimant's Exhibits: CX-___; Employer/Carrier's Exhibits: EX-___; and Joint Exhibit: JX-___.

1995, at a compensation rate of $107.39 for a total of 89 weeks, or $9,557.71. Claimant received temporary partial disability benefits from February 20, 1995 through October 28, 1995 at a compensation rate of $161.39, for a total of 36 weeks, or $5,796.36.[2] Additionally, Claimant received temporary partial disability payments in lump sums of $2,469.74 and $10,904.87 on February 25, 1995, and November 10, 1995, respectively, for the period of time when Claimant received decreased compensation benefits from June 1993 through October 1995, for a combined total of $28,728.68 in temporary partial disability benefits.

8. That Claimant's average weekly wage at the time of injury was $481.62.

9. That medical benefits for Claimant have been paid in the amount of $152,337.53 pursuant to Section 7 of the Act.

10. That Claimant reached maximum medical improvement from his right knee injury and from his back surgery on January 13, 1993, and May 18, 2000, respectively.

II. ISSUES

The unresolved issues presented by the parties are:

1. Causation of Claimant's hip injury.

---

[2] At the hearing, Claimant's counsel indicated Claimant received decreased compensation benefits from June 10, 1993 through October 27, 1995; however, Claimant's counsel also stated Claimant was paid $321.09 weekly from June 6, 1993 through October 30, 1995. Payment for Claimant's compensation benefits specifically on October 29, 1995, is neither identified in JX-1 nor reported in Employer's compensation records. (Tr. 11, 14; JX-1; CX-17).

It is noted that the period of time from February 20, 1995 to October 29, 1995 is 251 days, which represents 35.86 weeks (251 days ÷ 7 days per week = 35.86 weeks) and that the parties agreed the period of time from February 20, 1995 through October 28, 1995 may be appropriately represented as 36 weeks. Thus, in the absence of evidence indicating Claimant received no compensation benefits representing his disability status on October 29, 1995, the 36-week stipulation appears to represent the period of time from February 20, 1995 through October 29, 1995.

2. The nature and extent of Claimant's disability.

3. Entitlement to and authorization for medical care and services.

4. Claimant's residual post-injury wage-earning capacity.

5. Whether Employer/Carrier are entitled to special fund relief under Section 8(f) of the Act.

6. Attorney's fees, penalties and interest.

III. STATEMENT OF THE CASE

The Testimonial Evidence

Claimant

Claimant testified he came to the United States from Puerto Rico in 1979 or 1980. He completed high school in Puerto Rico. His ability to communicate in English was not good, nor were his grades, which were mostly Ds and Fs. (Tr. 22-24).

After arriving in the United States, Claimant found employment as a tacker, tacker/helper and eventually a welder. All of these jobs required heavy lifting, standing, bending and occasionally required Claimant to lie down on his back. Claimant worked for Employer/Carrier for four to five years before his job accident. He was required to lift 65 to 80 pounds regularly and squat, stoop and bend. (Tr. 24-30).

Claimant's accident occurred on February 9, 1989, when he tried to catch a tool box pushed or thrown up to him by another worker. He felt pain in his low back at the time. He continued working for a few days with pain in his lower back and also in his right knee. He initially treated with Dr. Askew, his family physician. Dr. Askew found muscle spasms upon physical examination and prescribed pain medication and muscle relaxants, which were not helpful. A CT scan was performed and revealed "corrupted discs." (Tr. 30-36).

After his ongoing pain continued without relief, Claimant was referred by Dr. Askew to Dr. John Jackson, a neurosurgeon who performed back surgeries on April 7, 1989, and March 1, 1991. Claimant's back condition improved somewhat; however, his pain persisted and migrated to other parts of his body, which

became problematic following each operation. Dr. Jackson sent Claimant to Dr. Charles Johnson for his ongoing knee complaints. In 1992, arthroscopic surgery was performed which improved Claimant's condition; however, Dr. Johnson indicated Claimant sustained a ten-percent permanent knee impairment. (Tr. 36-41, 84-85; CX-8, pp. 44, 49; CX-11, p. 2).

Claimant testified his hips began hurting a few days after the accident. He was sent by Dr. Jackson to Dr. Brent for his hip problems. In 1994, Claimant underwent a successful hip replacement on his right hip. In 1995, he underwent an unsuccessful hip replacement on his left hip. His hip surgery did not affect his back condition, which persisted. On a scale of one to ten, Claimant approximated his back pain as an "eight" normally. His pain increases nearly to a "ten" with activity. (Tr. 41-46).

At times, Claimant's left hip dislocates, but it does not hurt when this happens. He was diagnosed by Dr. Brent with avascular necrosis of the hips. After his hip surgery, Claimant was referred by Dr. Brent to Dr. Barrack for another opinion of Claimant's hip condition. Dr. Barrack told Claimant some bone in his hip was "deteriorated." (Tr. 41-46, 74-75).

Claimant was referred to Dr. Hernandez by Dr. Jackson for pain management. He has treated with Dr. Hernandez on an ongoing basis since April 2002. Dr. Hernandez provided facet injections into Claimant's back and administered radio wave ablation to treat pain. Dr. Hernandez prescribed medications, including Celebrex, Effexor, Theragesics and methadone. Effexor is used for Claimant's complaints of depression due to pain-related loss of intimacy with his wife and diminished interaction with his children.[3] Dr. Hernandez's treatment helps Claimant, who desires to continue treating with Dr. Hernandez. (Tr. 46-52, 60-61).

Claimant testified that he is now on Social Security disability and that Medicare pays for most of the pain management he has been receiving. However, he pays some out-of-pocket expenses for various medical prescriptions and bills associated with his ongoing pain management. (Tr. 52-54).

[3] Claimant became visibly upset and cried when talking about his intimacy difficulties with his wife.

Claimant receives weekly compensation benefits of $321.09, monthly Social Security disability payments of $844.00 and disability retirement payments from Employer/Carrier approximately $600.00 or more per month. His daily activities include staying in the house and watching TV. He is unable to perform any housework, but attempts to complete exercises and walk. He has difficulties sleeping due to low back pain which awakens him. His right hip is "100 percent," but his left hip continues to dislocate. (Tr. 54-59).

Claimant has remained physically unable to return to work since the occurrence of his accident. Before his injury he was "a hundred percent." He experienced no prior maladies nor treated with any doctors. He had no back or hip problems before this job accident.[4] (Tr. 61-62).

Claimant stated Spanish is his primary language and he cannot read or write in English. People sometimes have difficulties understanding his English. He has a driver's license, but it was converted to a valid license in this country from his Puerto Rican license. To complete the examination to obtain a driver's license in this country, Claimant required an individual to read the test to him in Spanish. (Tr. 62-64).

Claimant does not think he can perform any jobs because of his back pain. He may bend and squat only with support. He can sit for 30 minutes, but must then stand up or lay down to alleviate pain. He can walk for 1.5 miles, but not every day and only with someone walking with him. (Tr. 64-66, 78-79).

On cross-examination, Claimant affirmed he could not perform jobs identified by a vocational expert in 1993 because of ongoing pain and medications he took for his symptoms. Claimant indicated Dr. Jackson might have approved some jobs for him to try despite ongoing pain in 1993, before he underwent hip surgery, but recalled being told by Dr. Jackson not to return to work with pain or while using medications. (Tr. 67-71, 93).

According to Claimant, no doctors told him his hip problems are related to his job accident; however, Dr. Brent stated his hip condition is not work-related. He claims Dr. Jackson told

[4] Claimant's testimony regarding his pre-injury health is uncontroverted because Employer/Carrier were unable to discover any medical records of any pre—existing physical disabilities or prior injuries. (Tr. 140).

him his hip problem "could come from the job accident . . . [s]ince I was complaining about it from the beginning," but Dr. Jackson indicated he would rely on the opinion of Dr. Brent who "knows more about hips." (Tr. 71-72).

Claimant stated his left hip is problematic due to dislocation. However, the dislocation is not painful. Dr. Brent recommended another surgery on Claimant's left hip to diminish the risk of further injury related to the likelihood of dislocation while walking. (Tr. 74-75).

Before treating with Dr. Hernandez, Claimant took Valium, Centrum, calcium, Soma and Percocet. He ran out of the pain medications before his first appointment with Dr. Hernandez. Consequently, he was only taking Tylenol and vitamins when Dr. Hernandez first treated him. He affirmed his earlier testimony that he currently uses a variety of medications for pain and other symptoms. (Tr. 75-78).

Claimant testified that he quit working at Service Machine and Avondale because he was having difficulty understanding co-workers. Other than Employer/Carrier's counselors, nobody has recommended Claimant learn to speak and read English. He stated he cannot return to a school environment to learn English because of his painful condition. He is unable to read or write English well enough to help his wife pay bills and write checks or to help his children perform homework. (Tr. 79-81).

Claimant stated his wife was not working at the time of the hearing because she must care for him. She worked from the time "when they were married" until his injury. He acknowledged his earlier deposition testimony which indicated she did not work after their marriage, and stated his wife would have a better recollection of her dates of employment. (Tr. 89-91; EX-22).

Virginia Nevarez

Mrs. Nevarez testified she has been married to Claimant for more than 20 years. She worked for the Terrebonne Sheriff's Office until October 1988, when she quit. Her termination with that employer occurred before Claimant's job injury. She worked for about two years beginning in 2000 at a service station and store. (Tr. 94-96).

Before Claimant's job injury, he was "a man, you know, bringing home the money and everything." After the job injury, their life together "was just turned upside down." Mrs. Nevarez

first learned of Claimant's job injury when Claimant "came home, complaining of hurting . . . all over." Although Claimant reported back and leg pain to physicians, his pain was not limited to those particular anatomical areas. (Tr. 96-97).

Since the job injury, Claimant's ongoing pain has precluded his meaningful interaction with his family. At the time of the hearing, Claimant experienced pain in his low back. Pain management helped "a little, [but] not very much." Claimant's behavior was also affected by his job injury. He suffers from mood swings for which he needs depression medications. (Tr. 97-100).

Ms. Nevarez, who handles household bills, stated she and Claimant have incurred expenses of $2,655.70 for prescription medications. They also paid for approximately two visits at the pain management center. (Tr. 100-101; CX-21).

According to Ms. Nevarez, Claimant has worked "not a day since" his job injury. Claimant's visits with "vocational people" were generally unsuccessful in returning Claimant to work. Claimant can sit for approximately "a half hour to 45 minutes," but must "get up and move around" afterwards. He may walk only about "a block [or] two, maybe." He is unable to help around the house. His attempts to mow the lawn with a riding mower lasted approximately only 15 minutes. He may drive around 20 to 22 miles before he must "take a break and go around, stand up." He cannot read and may perform mathematical equations with single-digit numbers only. (Tr. 101-103). Ms. Nevarez was unaware of any post-injury job which Dr. Jackson may have approved for Claimant. (Tr. 106).

Mrs. Nevarez testified Claimant has continuing problems with a hip dislocation, but could not recall which hip is problematic for Claimant. She affirmed Claimant's testimony that their intimacy has been adversely affected by his job injury. (Tr. 103-104).

Since Claimant's injury, Mrs. Nevarez suffered two strokes and a heart attack. Consequently, she no longer works. Because Claimant cannot do anything after his job injury, their family income is limited to a combination of compensation benefits, Social Security benefits and a retirement benefit from Employer. (Tr. 104-107).

Ms. Nevarez affirmed that Claimant's main language is Spanish. Claimant may experience difficulty communicating in English if individuals speak too quickly. (Tr. 105-106).

Angela Harold

Angela Harold, who was accepted as an expert in vocational rehabilitation counseling, testified for Employer. She testified Claimant traveled from Raceland to his attorney's office in Mandeville, Louisiana, for a 1997 vocational interview. Claimant presented at his vocational interview using a cane and leg brace to ambulate. He needed to lay on a sofa with a pillow and blanket. (Tr. 108-113, 119; CX-15).

Claimant indicated he could not return to work due to ongoing pain. Claimant had trouble reading and writing in English. Ms. Harold administered tests which revealed Claimant possessed a "second grade, six month" passage comprehension score and an "eighth grade, ninth month" work identification score. Ms. Harold recommended further education to Claimant, who indicated he had not previously sought such education. As far as Ms. Harold knew, Claimant has made no effort to learn English. (Tr. 108-113, 121-122).

According to Ms. Harold, Claimant's communication difficulty substantially and materially adds to Claimant's other disabilities due to his physical limitations. Given Claimant's history of injury, Ms. Harold indicated doctors are likely to restrict Claimant to sedentary work, which generally requires greater communication skills. Claimant's deficient communications skills are immediately noticeable and would have been no better in 1985, when Claimant began working for Employer. (Tr. 112-114).

On cross-examination, Ms. Harold stated Claimant is unemployable, given his physical and language difficulties. A greeter job requires communication skills and an ability to stand during a shift. (Tr. 114-116).

Ms. Harold acknowledged Dr. Jackson's October 20, 1994 opinion that Claimant was totally disabled. She acknowledged Dr. Brent's 1997 opinion that Claimant was permanently, totally disabled from his back and hip conditions which equally caused his disability. She also acknowledged Dr. Jackson's March 1997 opinion that Claimant was permanently and totally disabled purely from his back injury, which alone resulted in a 65-

percent lumbar disability. [5] (Tr. 116-121; CX-15, pp. 1-9; EX-15, p. 52; EX-23(b), exhibit 2).

According to Ms. Harold, Claimant is totally disabled from returning to his former job as a welder. Likewise, according to the descriptions of Claimant's other prior jobs, Claimant is totally disabled from returning to work as a tacker, tacker/helper and dishwasher. She concluded Claimant had little to no vocational potential in his present condition. She stated Claimant would not be able to quickly ameliorate his difficulty communicating in English. Based on his achievement test scores, it "could take years" to rehabilitate Claimant's communication problems. From a vocational standpoint, Ms. Harold opined pain management is a good idea "if it's helping him [and] I think he said it's helping him a little bit." (Tr. 122-126).

Ms. Harold noted that the physical requirements of punch press operator are not the same as a "machine operator at sea" position, which involves standing, sitting, operating controls and possibly lifting fifty pounds. A newspaper inserter position typically requires an applicant to sit at a desk or stand to insert paper coupons or other documents into newspaper bulk. Depending on the employer, an applicant may not be required to lift or carry up to 30 pounds. A greeter position requires regular standing. (Tr. 126-129; CX-14).

Ms. Harold stated her conclusion that Claimant has little or no vocational potential includes the totality of his deficiencies, including his back and hip conditions as well as his difficulty with the English language. She indicated Claimant might have an earning potential approximated by the minimum wage at best; however, she agreed that Claimant could not return to such work without a release if various physicians opined he was totally disabled. (Tr. 129-132).

[5] In her May 16, 1997 report, Ms. Harold reported that Dr. Brent opined Claimant's asceptic necrosis of the hips was present prior to job-injury, based on "diagnostic studies," but Dr. Brent was unable to determine the etiology of the disease. Ms. Harold did not identify which diagnostic studies Dr. Brent relied upon in forming his opinion. (CX-15, p. 2).

The Medical Evidence

John D. Jackson, M.D.

On February 16, 1995, and October 9, 2002, Dr. Jackson was deposed by the parties. (CX-6; CX-7; EX-23(a); EX-23(b)).[6] On October 9, 2002, Dr. Jackson affirmed much of his earlier deposition testimony. (EX-23(b), p. 7).

Dr. Jackson began treating Claimant primarily for back complaints on March 30, 1989. On April 7, 1989, and on March 1, 1991, he operated on Claimant's back. On August 18, 1994, Dr. Jackson opined Claimant was totally disabled due to his back condition. On October 20, 1994, he specifically opined Claimant was disabled from work purely from his back condition, which had not recovered. Claimant's back condition remained problematic through 2002, when Dr. Jackson, who had nothing else neurosurgically to offer, recommended pain management for ongoing complaints. (EX-23(a), pp. 23-25; EX-23(b), pp. 4-5, 41-46; CX-8, pp. 19, 36-37; CX-11, pp. 44, 49).

At his 1995 deposition, Dr. Jackson opined Claimant's ongoing back pain following multiple back surgeries was totally disabling. He added that Claimant's hip condition, which appeared unrelated to his job injury, caused "confusion" because the entirety of Claimant's total disability was composed of his back disability, which would result in an impairment rating of 50 percent or higher, and his hip condition. He was hopeful that successful hip surgery would result in an asymptomatic condition, which would allow Claimant to return to work. (EX-23(a), pp. 28-30).

Despite ongoing back complaints and anticipated hip surgery, Dr. Jackson approved some jobs in 1993 for Claimant to "try" because Claimant needed money for his family. He approved jobs as a front door greeter for Wal-Mart, a punch-press operator for Gemoco, and a newspaper inserter for the Houma Daily Courier (the Courier). Claimant's successful performance of the jobs was the only way to establish his ability to perform the jobs. Dr. Jackson did not approve positions as a security

[6] Employer's Exhibit 23 includes two deposition transcripts identified separately as "Part I" and "Part II." For purposes of explication, Dr. Jackson's February 16, 1995 and October 9, 2002 deposition transcripts are referred to as 23(a) and 23(b), respectively.

guard, a bridge tender, or a pizza delivery driver. (EX-14, pp. 8-12; EX-23(a), pp. 7, 35-43).

Although he opined Claimant may try to return to work as a punch press operator, Dr. Jackson reconsidered his opinion in light of the medications, namely Flexeril and Percodan, Claimant was using. He opined Claimant must be free from medications to perform the job and added that Claimant should not generally be operating machinery while using any medications which increase drowsiness or decreases coordination. (EX-23(a), pp. 33-34).

At his 2002 deposition, Dr. Jackson noted some degenerative changes developed above the locations of Claimant's surgeries, but opined they were unrelated to Claimant's job injury. According to Dr. Jackson, Claimant's knee complaints, hip complaints and concomitant hip replacements are "probably degenerative symptoms not related to his [job] accident." Because Claimant's symptoms were not neurological, Dr. Jackson recommended pain management.[7] (EX-23(b), pp. 4-6, 49-50).

Dr. Jackson was unsure that any of Claimant's pain is related to his back surgeries which were "successful." The fusions were "solid," as revealed by several X-rays. Claimant's hip complaints were caused by asceptic necrosis of unknown etiology. Claimant's hip X-rays and MRIs were normal at the time of back surgery. According to Dr. Jackson, asceptic necrosis might be caused by using cortisone; however, Claimant was not prescribed enough post-surgery cortisone to cause the malady. (EX-23(b), pp. 6-9, 47-50; CX-9, pp. 89-90).

---

[7] On July 27, 2001, Dr. Jackson reported

> I am not sending [Claimant] to pain management for his hip problem. I am sending him and recommending that he go . . . for his chronic low back problem and lumbar disc condition. . . . Consequently, my hope is that he can receive pain management for his low back and lower extremity pain, and hopefully by getting him into a pain management program . . . [we] can gradually wean him off the stronger narcotics that he is receiving and get him into a pain management program that will eventually get him to the point that he can stop pain medications.

(CX-8, pp. 36-37; See also CX-8, pp. 107-108).

Claimant's ongoing symptoms related to his knees and hips are orthopedic in nature and beyond Dr. Jackson's area of expertise. Nevertheless, Dr. Jackson opined most of Claimant's pain is caused by his hips, knees, scoliosis and degenerative changes in his lumbar spine. Claimant's scoliosis and degenerative changes were not present when Dr. Jackson originally treated Claimant and are unrelated to Claimant's job injury. (EX-23(b), pp. 6-9, 46-47).

On May 18, 2000, Dr. Jackson treated Claimant following a May 14, 2000 slip and fall incident involving injuries to Claimant's hips and low back. Although Claimant experienced some pain and limited movement, Dr. Jackson opined Claimant did not injure his back on May 14, 2000, based on X-ray results. Dr. Jackson concluded Claimant was surgically at maximum medical improvement and needed no further surgical back treatment; however, he recommended pain management for ongoing symptoms of pain. According to Dr. Jackson, pain specialists may isolate the particular cause of Claimant's physical pain, which may be "coming from . . . where I operated, the nerves where I operated, or from the nerves above where [Claimant's] degenerative thing is," or determine whether there is a psychological component to Claimant's pain. (CX-8, pp. 34-35; EX-23(b), pp. 10-13, 34-38).

Dr. Jackson acknowledged his March 18, 1997 response to Employer/Carrier's March 3, 1997 request for an opinion of Claimant's physical restrictions and limitations related only to his back condition. Claimant could lift or carry up to ten pounds occasionally, but could never lift or carry any amounts exceeding ten pounds. He could occasionally reach above his shoulders. Although he could occasionally push and pull while seated, Claimant could never push and pull while standing, bending, squatting, crawling or climbing. (EX-6; EX-23(b), pp. 21-25; EX-23(b), exhibit 1).

In his March 18, 1997 report, Dr. Jackson opined Claimant could sit for a maximum of four hours with breaks approximately every 30 minutes to alternate positions. He could walk and stand no more than one hour with breaks approximately every ten minutes. He could use his hands for repetitive tasks, but could not use his feet for such tasks. He could not drive. He continued to suffer back pain and muscle spasms, and required medications daily. Based on the back injury alone, Dr. Jackson assigned a 65% "disability rating" and concluded Claimant was totally disabled. (EX-23(b), pp. 25-30; EX-23(b), exh. 2-3).

Dr. Jackson deferred to vocational experts for a determination of Claimant's functional capacities. He specifically denied an ability to provide ongoing pain management, which is better treated by a pain management specialist. He expected Claimant's permanent and total back disability was probably unchanged since March 1997. (EX-23(b), pp. 30-46; CX-8, pp. 107-108).

Donald J. Judice, M.D.

On April 5, 1989, Dr. Judice examined Claimant at Employer/Carrier's request. Although Claimant complained of severe pain in his back and legs, Dr. Judice found no objective results which would be consistent with Claimant's complaints. He noted a bulging disc at L4-5 and recommended further testing, including an MRI. (EX-3).

Charles L. Johnson, M.D.

On June 16, 1992, Claimant was referred by Dr. Jackson to Dr. Johnson, an orthopedic specialist. Claimant complained of pain which radiated from his hip to his right knee, but exhibited no swelling or "clear-cut mechanical type symptoms." X-rays were normal. Physical examination was generally normal, but some atrophy was reported in Claimant's quadriceps. Dr. Johnson opined Claimant probably had "a normal knee and a normal hip, and his pain is probably secondary to his lumbar spine surgeries." Dr. Johnson noted Claimant was never placed on a course of anti-inflammatory medications, and recommended their use for a trial period of two months. (CX-11, p. 22).

On August 17, 1992, Dr. Johnson reported no improvement in Claimant's condition after two months of taking anti-inflammatory medications. Dr. Johnson could not allocate the cause of Claimant's condition among the hip, knee and back complaints. He recommended arthroscopy, which was performed on September 18, 1992. The arthroscopy revealed a torn medial meniscus which was consistent with Claimant's post-injury knee complaints according to Dr. Johnson. On November 16, 1992, Dr. Johnson reported Claimant had full range of knee motion, but was complaining of pain that was different post-arthroscopy. He concluded that a substantial amount of Claimant's pain was related to his back condition rather than his knee condition. (CX-11, p. 5-7, 10-20; EX-13, p. 3).

On December 16, 1992, Dr. Johnson found no objective support for Claimant's underlying knee condition; however, he provided injections. He concluded he had nothing else to offer Claimant to improve Claimant's pain. On January 13, 1993, Dr. Johnson reported Claimant's knee remained painful for Claimant, who "scratched an abrasion on the medial aspect of his patella." Dr. Johnson could not explain the etiology of the pain and recommended another opinion or a knee MRI to determine if there was any additional pathology. (CX-11, pp. 3-4; EX-13, pp. 1-2).

In an undated response to a September 12, 1995 request from Claimant's attorney, Dr. Johnson opined Claimant reached maximum medical improvement from his right knee condition on January 13, 1993. He opined Claimant sustained a ten-percent permanent impairment rating to his right leg as a result of the job injury. (CX-11, pp. 1-2).

Walter H. Brent, Jr., M.D.

On August 6, 1993, Claimant was treated by Dr. Brent, an orthopedic specialist, at Dr. Jackson's referral. Claimant reported a history of injury followed by multiple back surgeries and knee therapy. Claimant had "since developed pain in both hips with an inability to walk comfortably and is using a cane to assist him in ambulation." Based on physical examination and the results of an MRI, Dr. Brent opined Claimant suffered from asceptic necrosis of the hips, which needed surgical treatment. Dr. Brent was unable to relate Claimant's hip complaints to his job injury. (CX-12, p. 4; EX-8, p. 1).

On subsequent visits, Claimant's hip complaints continued. Dr. Brent performed a total hip replacement on July 20, 1994. Claimant continued complaining of hip pain in both hips, but his right hip improved by October 11, 1994, when Dr. Brent opined it was difficult to understand the etiology of Claimant's pain. Claimant's bilateral hip pain continued until Dr. Brent performed a total hip replacement on Claimant's left hip on February 16, 1995. Claimant's hip pain continued; however, June 2, 1995 X-rays revealed excellent positioning of the prosthetic devices in Claimant's hips without evidence of any loosening. (CX-12, pp. 7-11, 15-18; EX-2, pp. 3-4).

On October 20, 1995, Claimant continued complaining of pain in his hips. Dr. Brent was unable to correlate X-ray results with Claimant's symptoms. He concluded some of Claimant's problems were "coming from his back with sciatica at the peroneal area on the right and the popliteal area on the left.

Claimant continued with hip pain; however, his left hip was more problematic. On July 12, 1996, Dr. Brent diagnosed a possible bursitis of the left hip causing pain. By July 30, 1996, Claimant reported he could tolerate ongoing pain following injections provided on July 12, 1996. Claimant continued complaining of left hip pain, subluxation and "popping" through May 27, 1997, when Dr. Brent referred him to Dr. Vrahas for a second opinion. Dr. Brent's medical records do not include Dr. Vrahas's second opinion. (CX-12, pp. 12-14).

On February 22, 2002, Dr. Brent reported Claimant complained of ongoing back complaints ever since his prior back surgeries performed by Dr. Jackson. Claimant continued with limited back motions. Dr. Brent opined Claimant suffered from chronic back problems with post-operative syndrome. He concluded Claimant would require ongoing treatment for pain in his back and left hip. Dr. Brent concurred with Dr. Jackson's recommendation for a pain management clinic that might eventually provide treatment without analgesics and muscle relaxants. (CX-12, p. 1).

Robert A. Steiner, M.D.

On December 20, 1993, Dr. Steiner evaluated Claimant at Employer/Carrier's request. He physically examined Claimant and reviewed Claimant's medical records. He opined Claimant suffered from degenerative lumbar disc disease that required multiple surgeries and reported Claimant demonstrated "some residual findings consistent with those lower back surgeries." He opined Claimant also suffered from bilateral asceptic necrosis involving the femoral heads that would soon require hip replacements. He noted that Claimant did not report hip injuries related to his job injury, nor was there any evidence of ongoing steroid use. On January 5, 1994, Dr. Steiner opined Claimant could return to sedentary work due to his back and/or knee conditions only. With his hip condition, Claimant was totally disabled from any work. (EX-4, pp. 4-7).

On January 28, 2002, Dr. Steiner reevaluated and physically examined Claimant at Employer/Carrier's request. Dr. Steiner opined Claimant suffered from multi-level degenerative lumbar disc disease and bilateral avascular necrosis of the femoral heads. He noted Claimant's reported left hip instability could cause complaints of pain. (EX-4, pp. 1-3).

Dr. Steiner opined Claimant was at maximum medical improvement from his lower back injury and surgeries. He

recommended ongoing treatment with analgesics and muscle relaxants indefinitely. He opined pain management was unnecessary because, "Certainly, Dr. Jackson could continue to write [Claimant] medications as he has been doing for the past ten years." (EX-4, p. 3).

Dr. Steiner opined Claimant was disabled by his "compensation injury" from returning to work at any exertional level greater than sedentary, with added restrictions against prolonged standing or walking and against any bending, stooping, twisting or lifting. With the hip condition, Dr. Steiner opined Claimant was totally disabled from any work. Id.

Mark Vrahas, M.D.

On November 23, 1994, Dr. Vrahas treated Claimant at Louisiana State University Medical Center pursuant to Dr. Brent's referral. Claimant reported a history of a back injury that required surgical treatment. After his hips became problematic following back surgery, Claimant was diagnosed with bilateral necrosis; however, Claimant reported no history of steroid use related to his back injury. His right hip was replaced after it collapsed. X-rays indicated to Dr. Vrahas that Claimant's right hip replacement was "extremely well done;" however, Claimant's left hip revealed classic signs of necrosis and collapse. Dr. Vrahas opined it was very difficult to understand the cause of Claimant's pain. The components of Claimant's right hip replacement were in excellent positions, but a lesion on Claimant's left hip might be causing pain. Dr. Vrahas recommended a left total hip arthroplasty. (EX-10).

Robert L. Barrack, M.D.

On January 12, 1999, Dr. Barrack treated Claimant at Dr. Brent's request.[8] Claimant complained of subluxation and dislocation of his left hip which usually occurred while sitting. He complained of continual subluxation and "popping" in his hip upon normal daily activities. Dr. Barrack reported Claimant's subluxation and instability were confirmed under fluoroscopy at "LSU." He advised Claimant that surgery may have an 80-percent chance of successfully treating his hip condition,

[8] Dr. Barrack's report does not indicate who referred Claimant to him, nor does Dr. Brent's records indicate a referral to Dr. Barrack; however, Claimant's testimony that Dr. Brent referred him to Dr. Barrack is uncontroverted. (Tr. 41-46, 74-75; EX-8; CX-12).

but that many of his aches and pains were back-related and non-treatable by hip surgery. Claimant was "very apprehensive" of further surgery and desired to consider his options. (EX-8).

Luis Hernandez, M.D.

On October 22, 2002, Dr. Hernandez was deposed by the parties who accepted him as an expert in the fields of anesthesiology and pain management. He treated Claimant in his office on April 3, 2002, July 2, 2002, July 25, 2002 and August 15, 2002. He provided lumbar facet injections on May 1, 2002, and radiofrequency ablation procedures on July 11 and 29, 2002. (CX-9, pp. 1-5, 30-31, 48-51).

On April 3, 2002, Claimant initially treated for back, leg and knee pain with Dr. Hernandez at Dr. Jackson's request. Claimant reported a history of ongoing pain since his 1989 job injury and a history of back and hip surgeries with Drs. Jackson and Brent. Dr. Hernandez diagnosed: (1) post-laminectomy syndrome at L4 through S1; (2) degenerative disc disease; (3) lumbar spondylosis with myelopathy; (4) severe muscle spasms; (5) depression; and (6) degenerative joint disease/avascular necrosis of the hips. (CX-9, pp. 6-15, 74-90; CX-10, pp. 1-22).

Dr. Hernandez stated post-laminectomy syndrome involves pain which occurs despite surgery to correct spinal problems. He was treating Claimant for pain at the levels at which Dr. Jackson operated as well as other areas, including the thoracic spine and "entire lumbar spine into the sacrum as well as into the legs." He indicated many patients, especially those who undergo multiple spinal surgeries, experience post-laminectomy syndrome due to post-operative scarring and fibrosis in the epidural space, among other sources that may cause the pain. (CX-8, pp. 6-7; CX-9, pp. 6-9, 22-24, 38).

Dr. Hernandez opined it was likely Claimant was experiencing some effects from post-operative scarring and fibrosis, and referred to Dr. Jackson's supplemental report indicating Claimant underwent a myelogram and post-myelogram CT scan which revealed evidence of "mainly scarring" and epidural fibrosis at the L5-S1 level. He added that Claimant's back pain may also be caused by other discs and ligaments. (CX-9, pp. 6-9, 22-24, 35-38).

Dr. Hernandez opined Claimant suffered from degenerative disc disease of multiple spinal areas, but could not comment on Dr. Jackson's opinion that Claimant's degenerative disc disease

above L4-5 was unrelated to surgery performed at L4-5 and L5-S1. However, he indicated he was treating facet blocks, which are innervated at the facet joint level or any other level than the ones which were fused. (CX-9, pp. 10-12).

According to Dr. Hernandez, lumbar spondylosis refers to vertebral arthritic changes involving bone spurs, while myelopathy refers to the corresponding facet changes and nerve pain occurring at the facet joint level or any other level due to degenerative changes in the spine. He stated both conditions may occur from age or from trauma, and noted Claimant was "not very old." Dr. Hernandez did not identify which discs were affected or symptomatic. He added that back pain is especially "multi-factorial," and it is difficult to conclude all of the sources of pain have been treated. (CX-9, pp. 10-14, 19).

Dr. Hernandez discussed his findings of muscle spasms throughout Claimant's back and neck and opined that all of the spasms could be related to Claimant's back injury. He acknowledged his sixth diagnosis included a hip condition; however, he noted he was not treating Claimant for that condition. Rather, he was specifically treating Claimant "for the back right now." Dr. Hernandez would focus on Claimant's hips after the lower back complaints were no longer a major complaint. He observed there are a "whole range of therapeutic modalities" to offer Claimant, but Claimant's back recovery may take time. He could not estimate a date on which he would begin treating Claimant's hips. (CX-9, pp. 14-19, 42-43).

Dr. Hernandez stated his goal was to alleviate Claimant's pain and ideally reach a point in which Claimant's pain would be relieved without medication; however, "more than likely, he will never be off some sort of medication or another." Claimant reported he was "out of his medicine" and was using only Tylenol and vitamins upon initially treating with Dr. Hernandez. Although Claimant indicated he experienced the most relief from Percodan, Dr. Hernandez prescribed Norco, Skelaxin, Celebrex and Effexor for ongoing joint pain, inflammation and depression. (CX-9, pp. 19-22; CX-10, pp. 1-22).

Dr. Hernandez successfully obtained Claimant's temporary pain relief through facet nerve blocks and radiofrequency ablation, which might be necessary procedures to repeat. If such procedures were not helpful, Claimant might need a spinal cord stimulator or an intrathecal pump "as a last resort." Dr. Hernandez provided a list of anticipated foreseeable future medical expenses associated with Claimant's treatment which did

not include recommended sacroiliac joint injections,[9] future medical prescriptions, or medical and psychological costs related to a spinal cord stimulator or intrathecal pump. He added that the necessity of the stimulator or pump was "speculative" and that the other procedures would hopefully reduce the amount of medication Claimant required. (CX-9, pp. 24-29, 52, 60-66, 90-94; CX-10, pp. 23-33, 34-38).

Karen Ortenberg, M.D.

On June 16, 2003, Dr. Ortenberg evaluated Claimant at Employer/Carrier's request. Claimant complained mostly of lower back pain, but also complained of pain and numbness from his back through his legs and into his feet. He complained of pain in his left hip, right knee, neck and shoulders. Claimant reported he could sit for approximately one hour, walk two blocks, stand one to two hours and lift about ten pounds. (EX-12, pp. 1-3).

Dr. Ortenberg opined Claimant's hip necrosis was not related to his back condition, but his left hip instability might need surgical treatment. She opined Claimant's neck and shoulder complaints were also unrelated to his job injury. She opined Claimant reached maximum medical improvement, but would continue requiring medication management to address his pain symptoms. She noted Claimant's condition was complicated by deconditioning associated with his post-injury sedentary lifestyle in addition to "the ongoing problems associated with extensive low back surgery." She recommended "ongoing medical

[9] On November 5, 2002, Claimant underwent sacroiliac injections, and an arthrogram was recorded which revealed dye spreading along joint lines. On November 26, 2002, he returned for follow-up, complaining of increased pain. He reported he could not afford ongoing pain medications. He was diagnosed with post-laminectomy syndrome, degenerative disc disease, lumbar-spondylosis with myelopathy, severe muscle spasms and depression. On February 6, 2003, Claimant returned with complaints of increased back pain and deep bone pain of his left prosthetic hip radiating into the femur. He reported discontinuing his prescriptions for financial reasons. Dr. Hernandez repeated his prior diagnosis. Claimant's complaints, diagnoses and recommendations remained generally consistent until June 19, 2003, when Dr. Hernandez recommended an epidural steroid injection bilaterally at S1. Dr. Hernandez's records do not indicate whether the injections were provided, and no further visits were reported. (CX-10, pp. 39-68).

management to address his pain symptoms" so that Claimant could become more functional. She recommended medications for pain, depression, insomnia and inflammation. (EX-12, p. 4).

Dr. Ortenberg was unsure whether Claimant's pain was a result of his back injury and subsequent surgery or from his hip condition. She opined Claimant was disabled purely by his low-back condition from returning to jobs greater than sedentary duty. She added that Claimant was not likely capable of tolerating full-time work. He would require a 'transitory period" whereby he would start at four hours per day and increase the daily duration of employment "as his work tolerance increased." She noted that Claimant's other medical problems are "by themselves debilitating." (EX-12, pp. 4-5).

Clearview Medical Imaging

On December 11, 1989, lumbar MRI and CT scan results revealed Claimant's fusion at L4-5 and laminectomy from L4 to S1 were "satisfactory." A small central herniation at L5-S1 reportedly narrowed inferior portions of the neural foramina, but the superior foramina was "satisfactorily patent." No significant abnormalities in the upper three lumbar discs were reported. (CX-13, pp. 29-32).

On August 1, 1990, an MRI of Claimant's hips revealed normal findings. No abnormalities were reported. (CX-13, pp. 25-27). On March 23, 1998, Claimant's lumbar spine revealed evidence of prior surgery at L4-5 and L5-S1. Significant narrowing of the disc spaces at L4-5 and L5-S1 was present. Bony fusion was suggested at L4-5. (CX-13, pp. 22-23).

On July 2, 1998, postoperative changes and posterior fusion changes extending from L4 to S1 were reported. Narrowing at L4-5 and L5-S1 were reported. Less than 2 mm. of residual motion was present. Little, if any, residual change occurred since March 23, 1998. (CX-13, pp. 19-20). On November 24, 1999, lumbar X-ray results revealed little, if any, residual motion at L4-5 and L5-S1, which was consistent with prior findings on Claimant's earlier studies. Mild lumbar dextroscoliosis with a slight right lateral offset of L3 was reported. Post-operative changes at L4-5 and L5-S1 were again reported. A suspected chronic hypertrophic facet joint arthropathy at L3-4 was noted. (CX-13, pp. 15-17).

On January 25, 2000, a lumbar MRI revealed evidence of prior surgery at L4-5 and L5-S1, which was "better defined and

evaluated" on Claimant's November 24, 1999 radiographs. Although metal from the prior surgeries interfered with the overall usefulness of the MRI, advanced degenerative disc disease at L4-L5 and L5-S1 and evidence of bony fusion at L4-5 were observed. Dehydration of normally configured L2-3 and L3-4 discs were noted. The central canal and subachranoid space at the lower lumbar levels appeared "adequate if not generous in its overall dimensions." (CX-13, pp. 9-13).

On May 18, 2000, X-ray examination of Claimant's lumbar spine revealed no appreciable change from Claimant's November 24, 1999 study. Evidence of prior surgeries was again reported at L4-5 and L5-S1. Substantial narrowing at L4-5 and L5-S1 was "similar to the prior study whether reflective of chronic degenerative disc disease and/or prior discectomy and interbody bony fusion." Chronic degenerative changes at L2-3 and L3-4 were reported. No new evidence of lumbar injuries related to a May 14, 2000 trauma was reported. (CX-13, pp. 5-7; EX-11).

Elmwood MRI, Ltd.

On July 21, 1993, an MRI of Claimant's hips revealed evidence of bilateral avascular necrosis of the femoral heads with degenerative joint disease. Bilateral hip joint effusions were also observed. (EX-2, pp. 1-2).

The Vocational Evidence

On July 7, 1992, Cindy A. Harris, a licensed rehabilitation counselor, administered academic testing which revealed Claimant functioned at a grade equivalency of 4.1. In comprehension and vocabulary skills, calculation skills and applied problems skills, Claimant possessed grade equivalencies of 1.7, 3.0 and 3.6, respectively. If Claimant was tested in Spanish, Ms. Harris opined he would have scored higher results. (EX-14, pp. 13-14). There is no indication Claimant was ever administered tests in Spanish.

Ms. Harris indicated a free English language class was available in which Claimant could enroll; however, Claimant did not appear motivated. Ms. Harris reported she was awaiting Dr. Jackson's opinion on Claimant's physical restrictions and limitations, which would be forthcoming upon Claimant's anticipated maximum medical improvement in July or August 1992, to prepare a list of jobs which would be suitable alternative post-injury employment. (EX-14, p. 15).

In check-the-box letters she sent to Drs. Jackson and Steiner on February 18, 1993, and January 25, 1994, respectively, Ms. Harris requested the physicians to select various jobs which were potentially suitable for Claimant within his physical restrictions and limitations. Her letters did not identify Claimant's former job requirements, nor did they identify his current physical restrictions and limitations assigned by any physicians. (EX-14, pp. 1-6, 8-12).

Ms. Harris provided a total of eight potential jobs for the Drs. Jackson and Steiner to review. A part-time position as a front door greeter for Wal-Mart required greeting customers, providing advertisements and coupons, issuing shopping carts to customers, wiping shopping carts, drying floors, frequent standing and occasional stooping and bending. Drs. Jackson and Steiner approved the job. (EX-5, p. 1; EX-14, pp. 1-2, 9).

A full-time punch press operator position required applicants to press buttons to operate and monitor oilfield cement equipment. The job was a light-duty job at Gemoco, which allowed alternative sitting and standing, but required maximum lifting of 25 pounds. Drs. Jackson and Steiner approved the job. (EX-14, pp. 1, 4, 10).

The Courier provided a part-time job which required applicants to insert a variety of advertising sections into daily newspapers. Alternative standing and walking was allowed, and a stool could be used for the job. Stooping and bending were occasionally required, while maximum lifting was 20 pounds. Drs. Jackson and Steiner approved the job. (EX-5, p. 3; EX-14, pp. 1, 4, 11).

Drs. Jackson and Steiner agreed that a light job as a pizza delivery driver requiring applicants to drive a car to deliver pizzas, obtain payment and provide correct change, take orders by phone, fold boxes, wash dishes, restock sauced and toppings, assist with food preparation and lift a maximum of 25 pounds was not within Claimant's physical capabilities. Likewise, both doctors indicated a sedentary to light position as a delivery driver requiring applicants to deliver prescriptions and supplies to private homes and public facilities and maximum lifting of 15 pounds was not within Claimant's physical capabilities. (EX-5, pp. 2, 4; EX-14, pp. 3, 5, 9, 12).

Dr. Steiner indicated Claimant was physically capable of performing a full-time, light to sedentary job as a security guard. The job required applicants, who might be armed, to

patrol commercial, industrial and residential areas. It provided alternative standing and sitting activities and required lifting of 5 to 10 pounds. Dr. Jackson indicated the job was beyond Claimant's physical capabilities on his form and in his 1995 deposition. (EX-5, pp. 2-3; EX-14, pp. 3-4; EX-23(a), p. 7).

Dr. Steiner approved a full-time "seasonal" seafood processor job in which applicants would process crab and oyster meat. Applicants were required to use a knife or rod to crack shells and inspect meat for quality control. The job was considered sedentary to light-duty and required maximum lifting of 5 to 10 pounds. Dr. Jackson did not receive a copy of this job description. (EX-5, p. 4; EX-14, pp. 5, 8-12).

Dr. Jackson indicated a bridge tender job requiring applicants to operate levers from a bridge operation booth to allow vessels passage beneath a bridge, climb stairs to grease bridge gears, and occasionally stoop, bend and climb was not within Claimant's physical capabilities. The job required maximum lifting of up to 25 pounds. Dr. Steiner did not receive a copy of this job description. (EX-14, pp. 1-5, 11).

In an undated response to a September 8, 1995 subpoena, Wal-Mart indicated no positions were available at the location identified in the check-the-box form Drs. Jackson and Steiner completed. A more thorough job description which indicated applicants must, among other things, complete "Basic and Advanced Training Modules and classes," regularly stand, and occasionally lift and move 10-pound objects was also provided. (CX-14, pp. 1-10).

On September 19, 1995, Gemoco indicated there were no punch press operator positions available, nor were any such positions available in 1993. However, there was a Machine Operator C position available in 1993. The requirements of that job included using overhead cranes and hoists, driving forklifts, read blueprints and perform work-in-process inspections. The job was a "medium" job requiring six to eight hours of daily standing and sitting as well as one to four hours of driving. Repetitive pushing, pulling, grasping, finger dexterity and foot movement were required, as were frequent bending, squatting, twisting and reaching. Occasional climbing was an additional requirement.[10] (CX-14, pp. 11-15).

[10] Gemoco's alternative Machine Operator C position was not considered by Drs. Jackson or Steiner. (EX-5; EX-14).

On September 19, 1995, the Courier reported the newspaper inserter position was available full-time and part-time during the entirety of 1993 with a starting hourly wage of $4.25. The job required standing 95 percent of the time and walking five percent of the time. Lifting and carrying 30 pounds was required, as were pushing and pulling 100 pounds. Applicants also needed to be capable of climbing, kneeling, crouching, reaching, handling and listening to instructions. A copy of an advertisement in the newspaper indicated applicants must be able to "lift 50 pounds or more." (CX-14, pp. 16-22).

Other Evidence

Coastal Rehabilitation & Counseling

On July 1, 2002, the Office of Workers' Compensation Programs (OWCP) referred Claimant to Gordon Landry, M.A., LRC, for a vocational rehabilitation program. On July 15, 2002, Mr. Landry reported Claimant was undergoing a pain management program and using medications, including Effexxor, Percocet, Skelaxin and Celebrex, which were prescribed by Dr. Hernandez. The medications reportedly caused dizziness. Claimant indicated he often experienced back and leg pain from walking. He could sit from 30 to 60 minutes, lift his 10.5-pound grand-child, briefly bend at the knees with support, and bend at the waist and climb ladders. (CX-20, p. 20; CX-16, pp. 1-2).

Claimant did not believe he could work as a gate guard due to his inability to read and write in English and because of his medications and dizziness. Claimant reported he could not work with medications, but without medications, his condition would even be worse. (CX-16, p. 4).

Mr. Landry concluded Claimant should continue with pain management, but his probability of success was "very poor" due to Claimant's self-perception and "powerful disincentives" in the form of workers' compensation and retirement and medical benefits. His short-term goal would be to reduce Claimant's pain and medicinal side-effects and possible enrollment into an English class; however, he opined Claimant's motivation was questionable. His long-term goal would be for Claimant to find employment which would not interfere with his Social Security and Medicare benefits. (CX-16, pp. 4-5; EX-9).

On August 20, 2002, Mr. Landry prepared another rehabilitation report in which he indicated Claimant's medications caused drowsiness and periodic sleep for up to two

hours. However, Claimant would periodically go 36 hours without sleep due to pain and discomfort. Claimant did not believe he could attend English classes due to ongoing pain, drowsiness and concentration difficulties. Claimant reported he could not sit or stand more than 30 minutes and was required to lay down due to pain. Accordingly, he did not believe he could return to meaningful work. (CX-16, pp. 6-7; EX-9).

Mr. Landry noted Claimant's symptoms of pain appeared to improve and concluded pain management was working. He again concluded Claimant's probability of success was "very poor" due to poor self-perception and ongoing powerful disincentives in the form of various financial benefits. His goals for Claimant remained the same. He anticipated contacting Dr. Hernandez soon for a prognosis and expected date of maximum medical improvement. (CX-16, pp. 7-8; EX-9).

On October 9, 2002, Mr. Landry reported that Claimant's symptoms of pain continued. Claimant's medications were unchanged. Mr. Landry noted that Claimant did not believe he could physically return to work or maintain concentration necessary to work or attend educational classes. Claimant did not believe he could stand long enough to work as a cashier because standing caused back pain. Claimant continued to believe he could not work as a security guard due to his inability to read and write, which are necessary to complete security reports. Mr. Landry told Claimant rehabilitation efforts would likely be unsuccessful. Claimant "did not disagree." (CX-16, pp. 9-10).

Mr. Landry continued to opine Claimant's probability of success was "very poor" for the same reasons he previously reported. He offered no short or long term goals and recommended closing Claimant's file because of Claimant's inability to benefit from rehabilitation services. (CX-16, pp. 10-11).

The Contentions of the Parties

Claimant argues his pain management, which has been performed by Dr. Hernandez since 2002, is reasonable and necessary treatment which is appropriate for his compensable injury, namely his back injury. He contends the treatment was recommended for his compensable back condition by both Drs. Jackson and Brent.

Claimant, who is currently receiving compensation benefits, argues that, from June 10, 1993 through October 27, 1995, his weekly compensation was erroneously reduced from $321.09 to $107.39. Subsequently, Claimant contends Employer/Carrier tendered payment of compensation benefits based on the higher compensation rate pursuant to an agreement between the parties. However, Claimant argues $11,407.57 remains outstanding and payable from June 1993 through October 1995, based on the higher compensation rate.

Claimant contends he has not been paid for his scheduled knee injury pursuant to Dr. Johnson's opinion that he sustained a ten percent permanent partial knee impairment. Claimant argues Dr. Jackson erroneously approved three jobs as suitable alternative employment. Claimant also seeks reimbursement for medical expenses paid out of his own pocket.

Employer/Carrier argue that Claimant's back pain is not related to his work injury, relying on Dr. Jackson's opinion that Claimant's current condition is related to hip complaints and degenerative lumbar changes unrelated to his compensable injury. They deny liability for Claimant's pain management because Dr. Hernandez could not identify the etiology of Claimant's back pain. They further contend that Claimant's cultural background and communication difficulties amount to a pre-existing permanent partial disability for purposes of Section 8(f) under the Act.

Alternatively, Employer/Carrier deny liability for additional compensation benefits based on a loss of Claimant's wage-earning capacity because Claimant's loss of wage-earning capacity is the result of his voluntary failure to improve his English speaking ability. Employer/Carrier argue Claimant failed to file a claim for a hip condition.[11]

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is

[11] On February 10, 1994, Claimant filed a Claim for Compensation in which he reported injuries to his "back, low back, both legs, [and] **hips**." (CX-1)

evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

A. Credibility

The administrative law judge has the discretion to determine the credibility of a witness. Furthermore, an administrative law judge may accept a claimant's testimony as credible, despite inconsistencies, if the record provides substantial evidence of the claimant's injury. Kubin v. Pro-Football, Inc., 29 BRBS 117, 120 (1995); See also Plaquemines Equipment & Machine Co. v. Neuman, 460 F.2d 1241, 1243 (5th Cir. 1972); Conoco, Inc. v. Director, OWCP [Prewitt], 194 F.3d 684, 33 BRBS 187 (CRT) (5th Cir. 1999).

I found Claimant's hearing testimony generally unequivocal and credible. I did not observe any deliberate efforts at deception or dishonesty. Claimant was in obvious discomfort and had to stand and lie down at breaks. He became visibly upset emotionally while describing his condition and resultant limitations. He testified fairly well, despite his language problem. I find his testimony is generally supported by the record. Accordingly, I find Claimant's testimony is credible and helpful for a resolution of the instant claim.

B. The Compensable Injury

Although the parties stipulated to a compensable injury involving Claimant's back, the causation of Claimant's hip condition is at issue. The causation of his knee condition is also arguably disputed. It is noted that Claimant has not

alleged his scoliosis, which Dr. Jackson opined was unrelated to his job injury, is work-related.

1. Claimant's Prima Facie Case

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment." 33 U.S.C. § 902(2). Section 20(a) of the Act provides a presumption that aids the Claimant in establishing that a harm constitutes a compensable injury under the Act. Section 20(a) of the Act provides in pertinent part:

> In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary-that the claim comes within the provisions of this Act.

33 U.S.C. § 920(a).

The Benefits Review Board (herein the Board) has explained that a claimant need not affirmatively establish a causal connection between his work and the harm he has suffered, but rather need only show that: (1) he sustained physical harm or pain, and (2) an accident occurred in the course of employment, or conditions existed at work, which **could have caused** the harm or pain. Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981), aff'd sub nom. Kelaita v. Director, OWCP, 799 F.2d 1308 (9th Cir. 1986); Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); Stevens v. Tacoma Boat Building Co., 23 BRBS 191 (1990). These two elements establish a **prima facie** case of a compensable "injury" supporting a claim for compensation. Id.

Claimant's **credible** subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case and the invocation of the Section 20(a) presumption. See Sylvester v. Bethlehem Steel Corp., 14 BRBS 234, 236 (1981), aff'd sub nom. Sylvester v. Director, OWCP, 681 F.2d 359, 14 BRBS 984 (CRT)(5th Cir. 1982).

In the present matter, the parties stipulated that Claimant sustained a job injury, as noted above. Further, Claimant credibly described hip pain and knee pain following his job injury. Accordingly, I find Claimant established a **prima facie** case of compensable post-injury hip and knee conditions.

2. Employer's Rebuttal Evidence

Once Claimant's **prima facie** case is established, a presumption is invoked under Section 20(a) that supplies the causal nexus between the physical harm or pain and the working conditions which could have cause them.

The burden shifts to the employer to rebut the presumption with substantial evidence to the contrary that Claimant's condition was neither caused by his working conditions nor aggravated, accelerated or rendered symptomatic by such conditions. See Conoco, Inc. v. Director, OWCP [Prewitt], 194 F.3d 684, 33 BRBS 187 (CRT)(5th Cir. 1999); Gooden v. Director, OWCP, 135 F.3d 1066, 32 BRBS 59 (CRT)(5th Cir. 1998); Louisiana Ins. Guar. Ass'n v. Bunol, 211 F.3d 294, 34 BRBS 29(CRT)(5th Cir. 1999); Lennon v. Waterfront Transport, 20 F.3d 658, 28 BRBS 22 (CRT)(5th Cir. 1994);. "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion. Avondale Industries v. Pulliam, 137 F.3d 326, 328 (5th Cir. 1998); Ortco Contractors, Inc. v. Charpentier, 332 F.3d 283 (5th Cir. 2003) (the evidentiary standard necessary to rebut the presumption under Section 20(a) of the Act is "less demanding than the ordinary civil requirement that a party prove a fact by a preponderance of evidence").

Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a). See Smith v. Sealand Terminal, 14 BRBS 844 (1982). The testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. See Kier v. Bethlehem Steel Corp., 16 BRBS 128 (1984). It has been repeatedly stated employers accept their employees with the frailties which predispose them to bodily hurt. J. B. Vozzolo, Inc. v. Britton, supra, 377 F.2d at 147-148.

If an administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. Universal Maritime Corp. v. Moore, 126 F.3d 256, 31 BRBS 119(CRT)(4th Cir. 1997); Hughes v. Bethlehem Steel Corp., 17 BRBS 153 (1985); Director, OWCP v. Greenwich Collieries, supra.

a. Claimant's Hip Condition

The overwhelming preponderance of contrary medical testimony and findings of record rebut Claimant's argument that his hip complaints are work-related. In weighing the entirety of the record, it is noted that Claimant related no immediate hip injuries from his job injury. Dr. Jackson's records reflect hip complaints began around April 12, 1990, over one year following the job injury. Dr. Jackson's testimony and records indicating Claimant's hips were normal when Dr. Jackson first began treating Claimant detracts from Claimant's testimony that his hips were problematic within days after his job injury. Likewise, Claimant's admissions that no doctors related his hip condition to his job accident and that Dr. Brent specifically advised him that his hip condition was unrelated to his job injury diminishes the persuasiveness of his testimony.

Although Claimant underwent surgical intervention for his back, there is no indication that his hip condition, namely avascular necrosis, is related to those surgeries. Rather, Dr. Jackson specifically opined Claimant's hip condition, which might be caused by steroid use, could not be related to Claimant's injury and treatment because the injury and surgeries did not warrant the use of significant amounts of steroids. His opinion is supported by the opinions of Drs. Vrahas and Steiner who discussed the condition and agreed that there was no history of ongoing steroid use related to Claimant's treatment for his compensable injury.

Moreover, there is no medical opinion of record indicating Claimant's avascular necrosis is related to his job injury. Claimant's own physicians, Drs. Jackson and Brent, could not relate the condition to the job injury. Dr. Ortenberg's opinion that Claimant's hip condition is unrelated to his job injury is consistent with the opinions of Drs. Jackson and Brent. Accordingly, I find that Employer/Carrier rebutted Claimant's **prima facie** case and, by weighing all the record evidence, find that Claimant failed to establish by a preponderance of the evidence that his avascular necrosis is related to his job injury based on the record as a whole.

b. Claimant's Knee Injury

The parties do not appear to dispute Claimant's torn meniscus and associated treatment was related to Claimant's knee complaints following his injury. Nevertheless, for the sake of explication, I find Claimant's knee condition, namely the torn

meniscus found during post-injury arthroscopy, is related to Claimant's job injury. Claimant credibly related his knee condition to his job injury, and his complaints were supported by the finding of a torn meniscus, as noted by Dr. Johnson. In treating Claimant for his job injury which involved back, leg and knee complaints, Dr. Jackson referred Claimant to Dr. Johnson, who opined Claimant's right knee injury was job-related and assigned a 10-percent permanent impairment rating to the right knee as of January 13, 1993.

Employer/Carrier have presented no contrary medical opinion severing the causal connection between Claimant's job injury and his right torn meniscus or undermining Dr. Johnson's impairment rating and thus failed to rebut Claimant's **prima facie** case. Consequently, I find Claimant's knee condition was caused by his job injury.

B. Nature and Extent of Disability

The parties stipulated that Claimant suffers from a compensable back injury, however the burden of proving the nature and extent of his disability rests with the Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept.

Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co.

v. Shea, 404 F.2d 1059 (5th Cir. 1968)(per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, supra, at 60. Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra, at 443.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

To establish a **prima facie** case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994).

Claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once Claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

C. Maximum Medical Improvement (MMI)

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, n. 5 (1985); Trask v. Lockheed Shipbuilding Construction Co., supra; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979).

An employee reaches maximum medical improvement when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v.

Quinton Enterprises, Limited, 14 BRBS 395, 401 (1981).

In the present matter, nature and extent of disability and maximum medical improvement will be treated concurrently for purposes of explication.

1. Claimant's Knee Injury

I find Dr. Johnson's uncontroverted opinion persuasive in establishing Claimant reached maximum medical improvement from his right knee condition on January 13, 1993. Consequently, all periods of disability related to Claimant's knee prior to January 13, 1993 are considered temporary under the Act.

At the hearing, the parties appeared to agree that Claimant received no compensation benefits for his permanent partial knee impairment, which should be treated as a scheduled injury under the Act. The parties offered no statutory or authoritative support for a conclusion that concurrent awards for the nature and extent of Claimant's scheduled and unscheduled injuries are permissible.

Under certain circumstances, multiple compensable injuries may result in concurrent awards for permanent partial disability and temporary or permanent total disability. Frye v. Potomac Elec. Power Co., 21 BRBS 194 (1988) (when a claimant suffers a scheduled injury and a nonscheduled injury arising either from a single accident or multiple accidents, he may be entitled to receive compensation under both the schedule and Section 8(c)(21)); Bass v. Broadway Maintenance, 28 BRBS 11, 17-18 (1994) (the Board partially overruled Frye, supra, to the extent the Frye holding was inconsistent, and held that where harm to a body part not covered under the schedule results from the progression of an injury to a scheduled member, a claimant is not limited to one award for the combined effect of his conditions, but may receive a separate award under Section 8(c)(21) for the consequential injury, in addition to an award under the schedule for the initial injury).

However, "it is axiomatic that a claimant may not be more than totally disabled." Carpenter v. California United Terminals, ___ BRBS ___, BRB Nos. 03-0213 and 03-0213A, slip op. @ 11 (Nov. 25, 2003) (concurrent awards for partial and total disability are subject to statutory maximums set forth at Sections 8(a) and 6(b)(1) of the Act); See also Green v. I.T.O. Corp. of Baltimore, 185 F.3d 239 (4th Cir. 1999) ("In no case should the rate of compensation for a partial disability, or

combination of partial disabilities, exceed that payable to the claimant in the event of total disability"); Brady-Hamilton Stevedore Co. v. Director, OWCP, 58 F.3d 419, 421, 29 BRBS 101, 103 (CRT) (9th Cir. 1995) (the combined payment of dual awards cannot exceed the statutory limit set forth in Section 8(a) for permanent total disability).

Moreover, "a schedule award cannot coincide with a total disability award, where the total disability is in part due to an injury under the schedule." Tisdale v. Owens-Corning Fiberglass Co., 13 BRBS 167, 171 (1981), aff'd mem. sub. nom Tidsale v. Director, OWCP, 698 F.2d 1233 (9th Cir. 1982), cert. denied, 462 U.S. 1106 (1983); See also Rupert v. Todd Shipyards Corp., 239 F.2d 273, 276 n. 1 (9th Cir. 1956) ("the Act should generally be interpreted as providing for an award intended to compensate for loss of earning capacity"); Collins v. Todd Shipyards Corp., 5 BRBS 334 (1977) ("there is no authority under the Act permitting compensation for a scheduled injury to be super-imposed upon continuing compensation for temporary total disability, and such an interpretation would be inconsistent with the Act's wage compensation principles"); Mahar v. Todd Shipyards Corp., 13 BRBS 603 (1983) (a claimant can receive a total disability award with a concurrent permanent partial disability award only where the claimant shows that the permanent and partially disabling injury occurred prior to the onset of permanent total disability).

The record supports a conclusion that Claimant's knee condition arose from the same traumatic circumstances that caused his back injury, as discussed above. The permanency of the knee condition was not established until well after the occurrence of the work-related accident, when Claimant was already being compensated at the maximum rate under the Act. I find Employer/Carrier's failure to concurrently compensate Claimant for a permanent partial injury under Section 8(c) of the Act when his disability status was considered total under Sections 8(a) or (b) of the Act is generally consistent with the maximum compensation rates set forth in the Act.

In Turney, supra, the Board considered a claimant's compensable leg and back injuries. The Board noted that scheduled awards cannot run concurrently with temporary or permanent total disability awards. In cases where a claimant is permanently totally disabled, an overlapping scheduled award is "subsumed in the total disability and cannot be paid." However, the result is different when a claimant is temporarily totally disabled because "a temporary award will end once [a] claimant

reaches maximum medical improvement. Once this occurs and the total award is terminated, the schedule award for the knee injury may resume." 17 BRBS at 235 n. 4 (1985). Otherwise, the Board found a scheduled award for the claimant's permanent partial leg disability "could run concurrently with an award of permanent partial disability for the back under Section 8(c)(21). To avoid double recovery, the schedule award will lapse during periods of temporary total disability." Id. at 235.

Likewise, I find Claimant established entitlement to awards for his compensable knee and back injuries, but his scheduled knee award cannot run concurrently with his temporary or permanent total disability awards. Thus, Claimant's award for his permanent partial knee condition is considered lapsed during all periods of total disability. During all periods of permanent total disability, Claimant's permanent partial knee condition is "subsumed in the total disability and cannot be paid."

Otherwise, should Claimant's total disability status terminate, the scheduled award for his knee injury may resume; however, Claimant's potential compensation award for his back injury under Section 8(c)(21) must "factor out" any loss of wage-earning capacity attributable to his knee injury. Turney, supra at 235. Thus, Employer/Carrier may be liable for compensation benefits for Claimant's ten-percent permanent knee condition pursuant to Sections 8(c)(2) and 8(c)(19) of the Act, based on Claimant's average weekly wage of $481.62, for a total potential liability of $9,246.18 ((.6666 x $481.62) x (.10 x 288 weeks) = $9,246.18), arguably subject to an apportionment among his scheduled and unscheduled injuries. See Padilla v. San Pedro Boat Works, 34 BRBS 49 (2000) (the Board affirmed a decision which apportioned compensation benefits to avoid exceeding the statutory maximum compensation rate of 66 2/3 percent of a claimant's average weekly wage).

2. Claimant's Back Injury

Pursuant to the parties' stipulations which are supported by the record medical opinions and reports, I find Claimant reached maximum medical improvement from his back condition on May 18, 2000. Consequently, all periods of Claimant's back disability prior to May 18, 2000 are considered temporary in nature.

February 9, 1989 through February 20, 1989

After his February 9, 1989 job injury, Claimant continued working through February 20, 1989. He sustained no loss in wage-earning capacity during that period and is not considered disabled under the Act. Thereafter, he could no longer work due to ongoing pain.

February 21, 1989 through May 17, 2000

Claimant could not perform post-injury work on or after February 21, 1989 due to pain. The medical records of Dr. Askew, who initially treated Claimant, are not of record; however, I find Claimant's credible complaints of pain and subsequent medical findings of muscle spasms, a painful herniated disc requiring surgery and a torn meniscus buttress a conclusion that Claimant was totally disabled from his prior occupation when he discontinued working due to pain following his job injury. I find Dr. Judice's April 5, 1989 opinion that Claimant's complaints were supported by no objective results are undermined by the multiple and contemporaneous findings by Dr. Jackson who performed Claimant's first back surgery two days later on April 7, 1989.

In light of the foregoing, I find Claimant established a **prima facie** case of total disability as of February 21, 1989. Thereafter, Claimant credibly testified he could not return to his prior occupation due to ongoing pain and use of medications. His testimony is supported by Dr. Steiner's 1993 and 1994 opinions that Claimant could return to "sedentary work activities only" because he suffered from degenerative disc disease and had some residual findings consistent with his "lower back surgeries."

Likewise, Claimant's testimony is supported by Dr. Jackson's October 1994 report and 1995 deposition testimony that Claimant was totally disabled due solely to his back condition. Dr. Jackson's 1997 report that Claimant remained totally disabled due to his back condition, which warranted a 65-percent impairment rating and which required multiple medications, further buttresses Claimant's testimony that he could not return to his prior occupation due to disabling post-injury back pain.

Moreover, I find Employer/Carrier failed to establish suitable alternative employment, as discussed below. Accordingly, I find Claimant was temporarily and totally disabled from February 21, 1989 through May 17, 2000.

Interim Periods between February 21, 1989, and May 17, 2000

A finding that Claimant remained totally disabled through May 17, 2000, supports Claimant's argument that he was entitled to compensation benefits based on his total disability during post-injury periods in which he was paid partial disability compensation benefits. For the 89-week period from June 7, 1993 through February 19, 1995, Claimant should have been paid $28,577.01 (89 weeks x $321.09 = $28,577.01); however, he received $9,557.71. (JX-1). Employer/Carrier are liable for compensation benefits for the $19,019.30 difference ($28,577.01 - $9,557.71 = $19,019.30).

For the 36-week period from February 20, 1995 through October 29, 1995, Claimant should have been paid $11,559.24 (36 weeks x $321.09 = $11,559.24); however, he received $5,796.36. (JX-1). Employer/Carrier are liable for compensation benefits for the $5,762.88 difference. ($11,559.24 - $5,796.36 = $5,762.88). Consequently, Employer/Carrier's total liability for the disputed periods amounts to $24,782.18 ($19,019.30 + $5,762.88 = $24,782.18).

However, Employer/Carrier tendered two lump sum payments for payable compensation benefits on February 24, 1995 and November 10, 1995 totaling $13,374.61 ($2,468.74 + $10,904.87 = $13,374.61). After the payments, an $11,407.57 deficit remained ($24,782.18 - $13,375.61 = $11,407.57). A review of Employer/Carrier's payment records does not establish Employer/Carrier tendered additional compensation benefits for the disputed periods. (CX-17). Accordingly, I agree with Claimant that Employer/Carrier are liable for $11,407.57 of unpaid compensation benefits.

May 18, 2000 through Present and Continuing

On May 18, 2000, Claimant's temporary total disability status became permanent total. The 2002 opinions of Drs. Jackson and Steiner were unchanged from their prior opinions. Dr. Steiner continued to restrict Claimant to sedentary work only, while Dr. Jackson opined Claimant's total disability condition was unchanged since 1997. The physicians' opinions which preclude Claimant from returning to his prior occupation are generally supported by vocational expert Harold's opinion that Claimant was totally disabled from returning to his prior occupation. Consequently, I find Claimant's disability status remained permanent total through present and continuing.

D. Suitable Alternative Employment

If the claimant is successful in establishing a **prima facie** case of total disability, the burden of proof is shifted to employer to establish suitable alternative employment. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). Addressing the issue of job availability, the Fifth Circuit has developed a two-part test by which an employer can meet its burden:

> (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?
>
> (2) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure?

Id. at 1042. Turner does not require that employers find specific jobs for a claimant; instead, the employer may simply demonstrate "the availability of general job openings in certain fields in the surrounding community." P & M Crane Co. v. Hayes, 930 F.2d 424, 431 (1991); Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039 (5th Cir. 1992).

However, the employer must establish **the precise nature and terms** of job opportunities it contends constitute suitable alternative employment in order for the administrative law judge to rationally determine if the claimant is physically and mentally capable of performing the work and that it is realistically available. Piunti v. ITO Corporation of Baltimore, 23 BRBS 367, 370 (1990); Thompson v. Lockheed Shipbuilding & Construction Company, 21 BRBS 94, 97 (1988). The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record. Villasenor v. Marine Maintenance Industries, Inc., 17 BRBS 99 (1985); See generally Bryant v. Carolina Shipping Co., Inc., 25 BRBS 294 (1992); Fox v. West State, Inc., 31 BRBS 118 (1997). Should the requirements of the jobs be absent, the administrative law judge will be unable to determine if claimant is physically capable of performing the identified jobs. See

generally P & M Crane Co., 930 F.2d at 431; Villasenor, supra. Furthermore, a showing of only one job opportunity may suffice under appropriate circumstances, for example, where the job calls for **special skills** which the claimant possesses and there are few qualified workers in the local community. P & M Crane Co., 930 F.2d at 430. Conversely, a showing of one **unskilled** job may not satisfy Employer's burden.

Once the employer demonstrates the existence of suitable alternative employment, as defined by the Turner criteria, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. Turner, 661 F.2d at 1042-1043; P & M Crane Co., 930 F.2d at 430. Thus, a claimant may be found totally disabled under the Act "when physically capable of performing certain work but otherwise unable to secure that particular kind of work." Turner, 661 F.2d at 1038, quoting Diamond M. Drilling Co. v. Marshall, 577 F.2d 1003 (5th Cir. 1978).

The Benefits Review Board has announced that a showing of available suitable alternate employment may not be applied retroactively to the date the injured employee reached MMI and that an injured employee's total disability becomes partial on the earliest date that the employer shows suitable alternate employment to be available. Rinaldi v. General Dynamics Corporation, 25 BRBS at 131 (1991).

Additionally, vocational rehabilitation training is not a factor to be considered in determining extent of disability, as neither the Act nor the regulations require that a claimant undergo vocational rehabilitation training. Hayes v. P & M Crane Co., 23 BRBS 389 (1990), vacated on other grounds, 24 BRBS 116 (CRT) (5th Cir. 1991). If an employee's background and age would make necessary rehabilitation difficult, frustrating and ultimately futile, he may be found permanently totally disabled. Mijangos v. Avondale Shipyards, Inc., 19 BRBS 15, 19 (1986) (citing Love v. W. M. Schlosser Co., 9 BRBS 749 (1978)).

Claimant credibly testified he could perform no post-injury work, including the 1993 jobs identified by vocational expert Harris, due to ongoing post-injury pain. Dr. Jackson's opinion that Claimant remained disabled from his injury supports Claimant's testimony. Notwithstanding Dr. Jackson's opinion that Claimant was totally disabled from work, Drs. Jackson and Steiner both indicated Claimant might attempt to return to three

post-injury jobs, namely a greeter, punch press operator and newspaper inserter.

The record supports a conclusion that two of the potential jobs, namely the greeter position and the punch press operator job, were actually unavailable for hire, as indicated by the responses of Wal-Mart and Gemoco. Moreover, Wal-Mart's supplemental job description indicates Claimant must pass employment tests and communicate well, capabilities which I find are not established in the record. Accordingly, I find the greeter job and punch press operator were not suitable alternative employment.

Further, Gemoco's supplemental job description of a Machine Operator C position, which was a "medium" job available in 1993 and required driving and operating machinery, appears beyond Dr. Steiner's sedentary restriction and contrary to Dr. Jackson's restriction against operating machinery while under the influence of medications. Consequently, I find the Machine Operator C job did not constitute suitable alternative employment reasonably available to Claimant.

The Courier's supplemental job description and advertisement, which I find are more accurate than Ms. Harris's brief synopsis provided to Drs. Jackson and Steiner, indicate the job exceeded Claimant's sedentary restriction assigned by Dr. Steiner. Specifically, Claimant would be required to stand "95 percent of the time," climb, kneel, crouch, reach and handle as well as lift more than 50 pounds or push and pull 100 pounds. Accordingly, I find the job did not constitute suitable alternative employment.

I find Claimant's explanation that he would be unable to work as a security guard due to ongoing symptoms and communication difficulties is generally supported by Dr. Jackson's opinion that the job required numerous activities beyond Claimant's capabilities. His testimony is also generally supported by vocational expert Harold, who indicated sedentary activities generally require communication skills and that Claimant's deficient communication skills would have been no better as long ago as 1985.

I find the opinions by Drs. Jackson and Steiner that the pizza delivery job and delivery driver jobs were beyond Claimant's physical capabilities are consistent with Dr. Jackson's opinion that Claimant should not operate machinery while using medications and that Claimant would be required to

enter and exit automobiles frequently, which was beyond his capabilities. Consequently, I find those jobs were not suitable alternative employment. Likewise, I find the bridge tender position, which would require Claimant to operate a bridge to provide motor vessels with safe passage and climb stairs to maintain gears was not suitable alternative employment.

I find the seafood processor job failed to constitute suitable alternative employment because the job description did not adequately identify the job's particular demands and requirements. Although the description indicates Claimant might alternatively sit or stand, the job does not indicate the extent to which Claimant would be required to sit, stand, twist, bend, kneel, squat or work around moving machinery while using a knife or rod to crack shells. Likewise, the job description does not indicate the extent to which Claimant might be required to work around machinery. Further, the job implicitly required Claimant to communicate well enough to understand the employer's standards of quality, which is not established in the record.

In light of the foregoing, I find none of the jobs identified by Employer/Carrier in 1993 constitute suitable alternative employment. Since 1993, Employer/Carrier identified no further job positions which they contend were within Claimant's physical restrictions and limitations. Rather, they submitted vocational expert Harold's opinions that Claimant has little or no vocational potential.

Employer/Carrier contend Claimant's diminished vocational potential is partly related to his voluntary failure to seek continuing education in adult literacy and in the English language. However, Ms. Harold conceded Claimant would not be able to quickly improve his communication, which could "take years" to ameliorate. Her testimony is generally consistent with Claimant's reasonable explanation that he never enrolled in English courses because he would have difficulty completing the courses due to his work-related painful condition. Claimant's testimony that his condition would preclude a successful return to the classroom is generally consistent with his report to Mr. Landry that he experienced concentration problems due to pain and medications.

Consequently, I find rehabilitation for Claimant's communication deficiencies would be difficult, frustrating and ultimately futile in light of his age and background. Accordingly, I find Employer/Carrier failed to establish

suitable alternative employment. Claimant therefore remains permanently and totally disabled.

E. Entitlement to Medical Care and Benefits

Section 7(a) of the Act provides that:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. § 907(a).

The Employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. For medical expenses to be assessed against the Employer, the expense must be both reasonable and necessary. Pernell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must also be appropriate for the injury. 20 C.F.R. § 702.402.

A claimant has established a **prima facie** case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984).

Section 7 does not require that an injury be economically disabling for claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 187.

Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury. Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1980); Wendler v. American National Red Cross, 23 BRBS 408, 414 (1990).

I find Claimant established a **prima facie** case for compensable pain management based on the consistent opinions of Drs. Jackson and Brent in favor of pain management. Their opinions are generally supported by Dr. Ortenberg's opinion that Claimant would likely require ongoing medical management for pain, depression and insomnia as well as by Dr. Steiner's opinion that Claimant may need medications indefinitely. I find Dr. Steiner's opinion that pain management would provide

duplicative services because Dr. Jackson may merely prescribe medications indefinitely is neither well-reasoned nor persuasive. I find Dr. Jackson's explanation that pain management is a unique specialty with possible modalities of treatment other than merely providing medication, which he could prescribe, is reasonable, uncontroverted and generally supported by Dr. Hernandez's testimony regarding multiple treatments he might provide Claimant.

Employer/Carrier argue pain management is unnecessary because Claimant only required Tylenol and vitamins prior to receiving pain management, but now uses multiple narcotics. Their argument overlooks Claimant's testimony and supporting medical records indicating that he used Tylenol and vitamins only because he ran out of extensive medications or was unable to afford refilling prescriptions prior to his visits with Dr. Hernandez. Further, their argument assumes Tylenol and vitamins render Claimant's condition asymptomatic or at least bearable, which is not supported by the record. Accordingly, I find Claimant's use of vitamins and Tylenol prior to treatment with Dr. Hernandez fails to establish pain management is unnecessary.

Moreover, I find Dr. Jackson's opinion that Claimant requires pain management due to his lower back and lower extremity conditions rather than for his hip condition is well-reasoned, uncontroverted and compels a conclusion that the services are related to Claimant's job injury. Likewise, Dr. Hernandez's testimony that he is treating Claimant purely for his lower back complaints rather than any hip complaints supports a finding that Claimant's pain management is reasonable, necessary and appropriate for his compensable back injury.

Employer/Carrier deny liability for Claimant's ongoing pain management because they argue Drs. Jackson and Hernandez were unable to determine the exact etiology of Claimant's low back pain. Their argument is without merit. Their argument fails to address Claimant's credible complaints of pain which have plagued him post-injury and post-surgery. Although Dr. Jackson found other degenerative changes in Claimant's spine and could not explain the etiology of Claimant's back pain, he never foreclosed the likelihood that Claimant's pain is related to his job injury. Rather, he specifically intimated Claimant's pain might be related to "where I operated, the nerves where I operated" or nerves above Claimant's degenerative disease. Employer/Carrier otherwise presented no medical testimony

establishing Claimant's back pain is entirely unrelated to his job injury.

Rather, the record includes diagnoses of post-operative syndrome and post-laminectomy syndrome by Drs. Brent and Hernandez, respectively, which are generally supported by Dr. Ortenberg's opinion that Claimant sustained ongoing problems "associated with low back surgery." Dr. Hernandez's testimony that such maladies have multiple causes other than identifiable epidural scarring is uncontroverted and generally consistent with Dr. Jackson's opinion that Claimant's pain may be caused by numerous sources including even a psychological component.

Moreover, Employer/Carrier have presented no authoritative support or meaningful method for apportioning Claimant's pain and associated pain management among allegedly compensable or non-compensable back conditions at different locations along Claimant's lumbar spine. Such an apportionment is arguably impossible, based on Dr. Hernandez's testimony that Claimant's pain may be caused by epidural scarring as well as by other discs or ligaments, and even by the innervation of facet blocks by multiple nerve roots at various spinal locations, including L4-5 and L5-S1 as well as L1 through L4.

In light of the foregoing, I find Employer/Carrier failed to rebut Claimant's **prima facie** case of entitlement to ongoing pain management related to his job injury. Accordingly, Employer/Carrier are liable for Claimant's recommended pain management services with Dr. Hernandez, including any out-of-pocket expenses for medical prescriptions which have not been reimbursed.

V. SECTION 8(f) OF THE ACT

Section 8(f) of the Act provides in pertinent part:

> (f) Injury increasing disability: (1) In any case which an employee having an existing permanent partial disability suffers [an] injury . . . of total and permanent disability or of death, found not to be due solely to that injury, of an employee having an existing permanent partial disability, the employer shall provide in addition to compensation under paragraphs (b) and (e) of this section, compensation payments or death benefits for one hundred and four weeks only.

> (2)(A) After cessation of the payments . . . the employee . . . shall be paid the remainder of the compensation that would be due out of the special fund established in section 44 . . .

33 U.S.C. § 908(f). Section 8(f) shifts liability for permanent partial or permanent total disability from the employer to the Special Fund when the disability is not due solely to the injury which is the subject of the claim. Director, OWCP v. Cargill Inc., 709 F.2d 616, 619 (9th Cir. 1983).

The employer must establish three prerequisites to be entitled to relief under Section 8(f) of the Act: (1) the claimant had a pre-existing permanent partial disability, (2) the pre-existing disability was manifest to the employer, and (3) that the current disability is not due solely to the employment injury. 33 U.S.C. § 908(f) Two "R" Drilling Co., Inc. v. Director, OWCP, 894 F.2d 748, 750, 23 BRBS 34 (CRT) (5th Cir. 1990); 33 U.S.C. § 908(f); Director, OWCP v. Campbell Industries, Inc., 678 F.2d 836 (9th Cir. 1982), cert. denied, 459 U.S. 1104 (1983); C&P Telephone Co. v. Director, OWCP, 564 F.2d 503 (D.C. Cir. 1977), rev'g 4 BRBS 23 (1976); Lockhart v. General Dynamics Corp., 20 BRBS 219, 222 (1988).

An employer may obtain relief under Section 8(f) of the Act where a combination of the claimant's pre-existing disability and his last employment-related injury result in a greater degree of permanent disability than the claimant would have incurred from the last injury alone. Director, OWCP v. Newport News Shipbuilding & Dry Dock Co., 676 F.2d 1110 (4th Cir. 1982); Comparsi v. Matson Terminals, Inc., 16 BRBS 429 (1984). Employment related aggravation of a pre-existing disability will suffice as contribution to a disability for purposes of Section 8(f), and the aggravation will be treated as a second injury in such case. Strachan Shipping Company v. Nash, supra, at 516-517 (5th Cir. 1986) (en banc).

Section 8(f) is to be liberally applied in favor of the employer. Maryland Shipbuilding and Drydock Co. V. Director, OWCP, U.S. DOL, 618 F.2d 1082 (4th Cir. 1980); Director, OWCP v. Todd Shipyards Corp., 625 F.2d 317 (9th Cir. 1980), aff'g Ashley v. Todd Shipyards Corp., 10 BRBS 423 (1978). The reason for this liberal application of Section 8(f) is to encourage employers to hire disabled or handicapped individuals. Lawson v. Suwanee Fruit & Steamship Co., 336 U.S. 198 (1949).

"Pre-existing disability" refers to disability in fact and not necessarily disability as recorded for compensation purposes. Id. "Disability" as defined in Section 8(f) is not confined to conditions which cause purely economic loss. C&P Telephone Company, supra. "Disability" includes physically disabling conditions serious enough to motivate a cautious employer to discharge the employee because of a greatly increased risk of employment related accidents and compensation liability. Campbell Industries Inc., supra; Equitable Equipment Co., Inc. v. Hardy, 558 F.2d 1192, 1197-1199 (5th Cir. 1977).

An existing permanent partial disability must have either a physical or mental foundation. Director, OWCP v. Potomac Elec. Power Co. [Brannon], 607 F.2d 1378, 10 BRBS 1048 (D.C. Cir. 1979). Elements such as a claimant's background, age, **limited education**, **language difficulties** and limited prior work experience do not constitute a "previous disability." Cononetz v. Pacific Fisherman, Inc., 11 BRBS 175, 178 (1979) (citing Collins v. Todd Shipyards Corp., 9 BRBS 1015 (1979) ("handicapped," as defined by the Supreme Court in Lawson v. Suwanee Fruit & Steamship Co., 336 U.S. 198 (1949), connotes "some physical or mental impairment, viz., a defect in the human frame; it does **not** encompass **social or economic limitations**")).

Illiteracy is not a pre-existing permanent partial disability, though it may be a symptom of mental retardation and/or a learning disability, both of which have met the definition. State Comp. Ins. Fund v. Director, OWCP [Watts], 818 F.2d 1424, 20 BRBS 11 (CRT) (9th Cir. 1987).

1. Pre-existing permanent partial disability

a. Claimant's Communication Skills

Employer/Carrier argue "it is certain that the educational/language situations qualify as a pre-existing disability," relying on American Mutual Insurance of Boston v. Jones, 426 F.2d 1263 (D.C. Cir. 1970). I find the facts considered in Jones are inapposite to the instant claim.

In Jones, the court specifically noted that "some degrees of mental retardation are so severe that they cannot fairly be characterized as other than 'manifest.'" The issue addressed by the court was "whether [the claimant's] disability was of such degree during the time of his employment." The claimant was a "63-year-old man of limited intelligence," which was established as early as 1963, when his intelligence quotient on the

"Wechsler-Bellvue scale was measured as 69; according to any of the standard nomenclatures, this would place him at the borderline of mental retardation." 426 F.2d at 1265-1268.

The court concluded "the degree of mental retardation cannot be adequately gauged by intelligence quotient alone." Rather, "its true measure is the extent to which, because of inadequately developed intelligence, an individual's ability to learn and to adapt to his environment is impaired." The court found nothing in the record indicating that the claimant, up to the time of his job injuries, showed a "sufficient degree of social maladaption due to limited intelligence that his disability could be fairly classed as 'manifest.'" Id.

In the present matter, there is no allegation or indication that Claimant suffers from mental retardation. There are neither psychological tests nor medical records establishing any mental retardation. Although Employer/Carrier's vocational experts concluded Claimant may function at lower levels in academics, Ms. Harold specifically concluded Claimant would have scored higher results if properly tested in his own language. There is no evidence Claimant was ever tested in Spanish. Further, I find no evidence that Claimant suffered a "sufficient degree of social maladaption due to limited intelligence that his disability could be fairly classed as 'manifest.' Consequently, a conclusion that Claimant suffers from mental retardation is not established in the record.

Employer/Carrier argue Claimant should be considered functionally illiterate, which should qualify as a pre-existing disability under Section 8(f) of the Act. In Watts, supra, a vocational rehabilitation specialist testified that she believed the claimant was learning disabled. The specialist also stated that tests would be necessary in order to determine whether the claimant was retarded or learning disabled, but did not test Claimant for any mental impairment. The court found that, "[e]ven if fully credited, the vocational specialist's testimony does not constitute substantial evidence that [the claimant] suffered from a pre-existing permanent partial disability." According to the court, illiteracy due to lack of education is distinguished from illiteracy due to a learning disability because the latter is a "permanent irrevocable reduction of individual capability." Watts, 20 BRBS (CRT) at 12.

Similarly, I find no credible evidence indicating Claimant's functional illiteracy is due to mental retardation or a learning disorder. Further, I find Ms. Harold's testimony

that it may take a long time to ameliorate Claimant's condition does not establish that Claimant suffers from a permanent irrevocable reduction of individual capacity. Likewise, I find Claimant's testimony that he is limited from successfully attending English classes due to ongoing concentration difficulties from job-related pain and medications fails to establish his functional illiteracy is due to pre-existing mental retardation or any learning disability.

In light of the foregoing, I find Claimant's background, age, limited education, language difficulties and limited prior work experience do not constitute a "previous disability" under Section 8(f) of the Act.

b. Claimant's Hip Condition

Employer/Carrier argue Claimant's hip necrosis constitutes a pre-existing permanent partial injury. They conceded at the hearing "we never could find out anything on the hips, whether it pre-existed, it just came out of nowhere . . . . [If Claimant] was able to give us a clearer history, . . . maybe we could find out where it came from. Maybe it was pre-existing. We don't know; we don't have that information." (Tr. 140).

Thus, without any objective medical evidence predating Claimant's job injury and establishing Claimant suffered hip necrosis, I find Employer/Carrier's unsupported argument is not persuasive. Moreover, Employer/Carrier offered no compelling explanation why Claimant's inability to speak English as well as Spanish precludes them from locating relevant medical records establishing whether his necrosis predated his employment.

Further, I find Dr. Jackson's uncontroverted testimony that Claimant's post-injury hip X-rays and MRI results were originally normal before he provided surgical treatment detracts from the persuasiveness of Employer/Carrier's argument that Claimant suffered from a pre-existing permanent partial hip disability which was "manifest." Likewise, I find his testimony and records diminishes the persuasiveness of a notation in a vocational report that Dr. Brent may have opined Claimant's necrosis pre-dated his job injury. If Dr. Brent offered such an opinion at a vocational meeting, his report and any supporting pre-injury studies or films are not of record. Consequently, I find Employer/Carrier failed to establish Claimant's hip condition constitutes a pre-existing permanent partial injury.

In the absence of substantial medical evidence or any medical records establishing Claimant suffered from any pre-existing permanent disability, I find Employer/Carrier failed to establish Trust Fund liability for Claimant's condition, and the remaining considerations, namely whether Claimant's pre-existing condition was manifest and whether the pre-existing disability contributed to a greater degree of disability are rendered moot.

Accordingly, Employer/Carrier's request for Section 8(f) relief is **DENIED**.

VI. SECTION 14(e) PENALTY

Section 14(e) of the Act provides that if an employer fails to pay compensation voluntarily within 14 days after it becomes due, or within 14 days after unilaterally suspending compensation as set forth in Section 14(b), the Employer shall be liable for an additional 10% penalty of the unpaid installments. Penalties attach unless the Employer files a timely notice of controversion as provided in Section 14(d). 33 U.S.C. § 914(e).

A notice of controversion must be filed when a dispute arises over the amount of compensation due, even if some compensation is voluntarily tendered. Lorenz v. FMC Corp., Marine & Rail Equip. Div., 12 BRBS 592, 595 (1980). An employer should pay compensations benefits it considers due and controvert the remainder, which may be subject to a penalty under Section 14(e) of the Act. See Alston v. United Brands Co., 5 BRBS 600, 607 (1977); Browder v. Dillingham Ship Repair, 25 BRBS 88, 90-91 (1991). Liability for the Section 14(e) penalty ceases on the date of the filing of the notice of controversion or on the date of informal conference, whichever comes first. National Steel & Shipbuilding Co. v. Bonner, 600 F.2d 1288, 1295 (9th Cir. 1979).

Employer/Carrier voluntarily tendered post-injury compensation based on total disability through June 6, 1993. On June 7, 1993, Employer/Carrier unilaterally reduced Claimant's compensation based on partial disability. They did not controvert the reminder of compensation benefits due to Claimant until February 23, 1994. (JX-1; EX-17).

In accordance with Section 14(b), Claimant was owed compensation on the fourteenth day after compensation was due. Thus, Employer/Carrier were liable for Claimant's disability compensation payment on June 21, 1993. Because Employer/Carrier

controverted Claimant's right to total compensation based on his alleged residual wage-earning capacity, they had an additional fourteen days within which to file with the District Director a notice of controversion. Frisco v. Perini Corp. Marine Div., 14 BRBS 798, 801, n. 3 (1981). A notice of controversion should have been filed by July 5, 1993 to be timely and prevent the application of penalties.

Consequently, I find and conclude that Employer/Carrier did not file a timely notice of controversion on February 23, 1994 and are liable for Section 14(e) penalties for the difference between the temporary partial disability compensation benefits paid to Claimant and the temporary total disability compensation benefits Claimant is owed from June 7, 1993, when the controversy over Claimant's nature and extent of disability arose, until February 23, 1994, when Employer/Carrier filed their Notice of Controversion.

Additionally, Employer/Carrier filed a Form LS-206, Payment of Compensation without Award, on March 6, 1989, when they elected to compensate Claimant at a compensation rate of $321.09 for his total disability status, on July 14, 1993, when they reduced Claimant's compensation rate to $107.39 because "jobs located [sic] at 6.00/hour [sic]," on February 21, 1995, when they increased his compensation rate to $161.08 after an "adjustment of overpayment has been credited," and on November 27, 1995, when they increased Claimant's compensation rate to $321.09 without explanation. (CX-3).

Moreover, Employer/Carrier have not alleged the Forms LS-206 are the functional equivalent of a Notice of Controversion. I find no indication that Claimant's right to compensation was being controverted in the LS-206 submissions, nor do I find sufficient explanation of the grounds for any controversion. See Hawthorne v. Ingalls Shipbuilding, Inc., 28 BRBS 73 (1994) (an LS-206 was not the functional equivalent of timely filed notices of controversion sufficient to relieve an employer of liability under Section 14(e) of the Act).

VII. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the

employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. See Grant v. Portland Stevedoring Company, et al., 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

VIII. COST OF LIVING INCREASES

Section 10(f), as amended in 1972, provides that in all post-Amendment injuries where the injury resulted in permanent total disability or death, the compensation shall be adjusted annually to reflect the rise in the national average weekly wage. 33 U.S.C. § 910(f). Accordingly, upon reaching a state of permanent and total disability on May 18, 2000, Claimant is entitled to annual cost of living increases, which rate is adjusted commencing October 1 of every year for the applicable period of permanent total disability, and shall commence October 1, 2000.[12] This increase shall be the lesser of the percentage that the national average weekly wage has increased from the preceding year or five percent, and shall be computed by the District Director.

IX. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the

[12] See Trice v. Virginia International Terminals, Inc., 30 BRBS 165, 168 (1996)(It is well established that claimants are entitled to Section 10(f) cost of living adjustments to compensation only during periods of permanent total disability, not temporary total disability); Lozada v. Director, OWCP, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990) (Section 10(f) entitles claimants to cost of living adjustments only after total disability becomes permanent).

Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorney's fees.[13] A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

X. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer/Carrier shall pay Claimant compensation for temporary total disability from February 21, 1989 to May 17, 2000, based on Claimant's average weekly wage of $481.62, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

2. Employer/Carrier shall pay Claimant compensation for permanent total disability from May 18, 2000, to present and continuing thereafter based on Claimant's average weekly wage of $481.62, in accordance with the provisions of Section 8(a) of the Act. 33 U.S.C. § 908(a).

3. If Claimant's total disability status terminates, Employer/Carrier shall pay Claimant compensation for a ten-percent permanent partial disability related to his right knee pursuant to Sections 8(c)(2) and 8(c)(19). 33 U.S.C. §§ 908(c)(2), 908(c)(19).

---

[13] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 813 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **December 18, 2002**, the date this matter was referred from the District Director.

4. Employer/Carrier shall pay to Claimant the annual compensation benefits increase pursuant to Section 10(f) of the Act effective October 1, 2000, for the applicable period of permanent total disability.

5. Employer/Carrier shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's February 9, 1989, work injury, including the ongoing pain management services of Dr. Hernandez, pursuant to the provisions of Section 7 of the Act.

6. Employer/Carrier shall be liable for assessments under Section 14(e) of the Act for the extent to which installments found to be due and owing prior to February 23, 1994, as provided herein, exceed the sums which were actually paid to Claimant.

7. Employer shall receive credit for all compensation heretofore paid, as and when paid.

8. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

9. Claimant's attorney shall have thirty (30) days from the date of service of this decision by the District Director to file a fully supported and verified fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

ORDERED this 7th day of January, 2004, at Metairie, Louisiana.

A

LEE J. ROMERO, JR.
Administrative Law Judge